

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BLUEFIELD DIVISION**

**OHIO VALLEY ENVIRONMENTAL  
COALITION, WEST VIRGINIA  
HIGHLANDS CONSERVANCY,  
APPALACHIAN VOICES, and  
THE SIERRA CLUB**

**Plaintiffs,**

v.

**Civil Action No. 1:19-cv-00576**

**BLUESTONE COAL CORPORATION**

**Defendant.**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR CIVIL  
PENALTIES**

1. This is a citizen suit for declaratory and injunctive relief as well as for civil penalties against Defendant, Bluestone Coal Corporation, (“Bluestone”) for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereafter the Clean Water Act (“CWA”)), and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq (“SMCRA”) at the Red Fox Mine in McDowell County, West Virginia.

2. As detailed below, Plaintiffs allege that Bluestone has discharged and continues to discharge pollutants into waters of the United States in violation of Sections 301 and 402 of the CWA, 33 U.S.C. § 1311, 1342, and the conditions and limitations of West Virginia/National Pollutant Discharge Elimination System (“WV/NPDES”) Permit No. WV1006304 issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

3. Plaintiffs further allege that Bluestone’s discharges of pollutants into waters adjacent to the Red Fox Surface Mine violate the performance standards of SMCRA, the West

Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) and the terms and conditions of West Virginia mining permit S007282.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 33 U.S.C. § 1365 (CWA’s citizen suit provision) and 30 U.S.C. § 1270 (SMCRA citizen’s suit provision).

5. On June 4, 2019, Plaintiffs mailed notice of the violations and their intent to file suit in letters addressed to the Defendant, the United States Environmental Protection Agency (“EPA”), the Office of Surface Mining Reclamation and Enforcement (“OSMRE”), and the West Virginia Department of Environmental Protection (“WVDEP”), as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A) and Section 520(b)(1)(A) of SMCRA, 30 U.S.C. § 1270 (b)(1)(A).

6. More than sixty days have passed since the notice letters were sent. EPA, OSMRE, and/or the WVDEP have not commenced or diligently prosecuted a civil or criminal action to redress the violations. Moreover, neither EPA nor WVDEP has commenced an administrative penalty action under 309(g) of the CWA, 33 U.S.C. § 1319(g), or a comparable state law to adequately redress the violations within the notice letters.

7. Venue in this District is proper pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the CWA violations are located in this District, and pursuant to 30 U.S.C. § 1270(c) because the coal mining operation complained of is in this District.

8. Bluestone is a West Virginia corporation engaged in the business of mining coal. Bluestone holds SMCRA and WV/NPDES permits for the Red Fox Mine in McDowell County, West Virginia.

9. Bluestone is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 701(19) of SMCRA, 30 U.S.C. § 1291(19).

10. Plaintiff Ohio Valley Environmental Coalition is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 400 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

11. Plaintiff West Virginia Highlands Conservancy is a nonprofit organization incorporated in West Virginia. It has approximately 1,700 members. It works for the conservation and wise management of West Virginia's natural resources, and is one of West Virginia's oldest environmental activist organizations. The West Virginia Highlands Conservancy is dedicated to protecting our clean air, clean water, forests, streams, mountains, and the health and welfare of the people that live here and for those who visit to recreate.

12. Plaintiff Appalachian Voices is a nonprofit North Carolina corporation committed to protecting the land, air, and water of the central and southern Appalachian region. It focuses on reducing coal's impact on the region. Appalachian Voices has more than 1,000 members, the majority of which reside in the Appalachian region, including members in West Virginia. Its concerns include the protection and restoration of West Virginia's waters.

13. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 780,000 members and supporters nationwide including approximately 2,600 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is

dedicated to exploring, enjoying, and protecting the wild places of Earth; to practicing and promoting the responsible use of Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment, and protection of surface waters in West Virginia.

14. Plaintiffs have members, including Dustin White and Erin Savage, who use, enjoy, and benefit from the water quality in tributaries receiving discharges from Defendant's surface waters and downstream waters including Horsepen Creek, Big Creek, Cucumber Creek and Jacobs Fork, all tributaries of the Tug Fork River. Their recreational and aesthetic interests, including fishing, wading, and enjoying the waters of these streams are impaired as a result of mining pollution from Defendant's operations.

15. Plaintiffs' members would like to recreate in areas downstream from where the Red Fox Mine discharges. Because of pollution from this mine, Plaintiffs' members refrain from using or restrict their use of those streams. As a result, the environmental, aesthetic, and recreational interests of these members are adversely affected by Bluestone's excessive discharge of pollutants. If Bluestone's unlawful discharges ceased, the harm to the interests of Plaintiffs' members would be redressed. An injunction would redress Plaintiffs' members' injuries by preventing future violations of the limits in Bluestone's permits. Civil penalties would provide deterrence for future violations.

16. At all relevant times, Plaintiffs were and are "persons" as that term is defined by the CWA, 33 U.S.C. § 1362(5) and SMCRA, 30 U.S.C. § 1291(19).

#### **STATUTORY AND REGULATORY FRAMEWORK**

17. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms and conditions of a permit, such as a NPDES permit issued by EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

18. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit-issuing authority may issue a NPDES Permit that authorizes the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA and such other conditions as the permitting authority determines necessary to carry out the provisions of the CWA.

19. The Administrator of EPA authorized WVDEP, pursuant to Section 402(a)(2) of the CWA, 33 U.S.C. § 1342(a)(2), to issue NPDES permits on May 10, 1982. 47 Fed. Reg. 22363. The applicable West Virginia law for issuing NPDES permits is the Water Pollution Control Act, W.Va. Code § 22-11-1, et seq.

20. Section 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes any “citizen” to “commence a civil action on his own behalf. . . . against any person. . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.”

21. Section 505(f) of the CWA, 33 U.S.C. § 1365(f), defines an “effluent standard or limitation under this chapter,” for purposes of the citizen suit provision in section 505(a) of the CWA, 33 U.S.C. § 1365(a), to mean, among other things, an unlawful act under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and “a permit or condition thereof issued” under Section 402 of the CWA, 33 U.S.C. § 1342.

22. In an action brought under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), the district court has jurisdiction to order the defendant to comply with the CWA and to assess civil penalties.

23. Under Section 505(d) of the CWA, 33 U.S.C. § 1365(d), the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.”

24. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States of up to \$25,000 per day for each violation.

25. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, the court may assess a civil penalty of up to \$54,833 per day for each violation that occurred after November 2, 2015. *See* 40 C.F.R. § 19.4.

26. Section 506 of SMCRA, 30 U.S.C. § 1256, prohibits any person from engaging in or carrying out surface coal mining operations without first obtaining a permit from OSMRE or from an approved state regulatory authority.

27. At all relevant times, the State of West Virginia has administered an approved surface mining regulatory program under SMCRA. *See* 30 C.F.R. § 948.10.

28. The WVSCMRA provides that “[a]ny permit issued by the director pursuant to this article to conduct surface mining operations shall require that the surface mining operations meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director.” W.Va. Code § 22-3-13(a). In turn, WVDEP’s

regulations provide that “[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and this rule.” 38 C.S.R. § 2-3.33.c.

29. State and federal performance standards under SMCRA and WVSCMRA mandate that all discharges from permitted mining operations “be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. part 434.” 30 C.F.R. § 816.42; *see also*, 38 W.Va. C.S.R. § 14.5.b. Accordingly, violations of effluent limitations are violations of SMCRA, WVSCMRA and Bluestone’s Mining Permits.

30. Like the CWA, SMCRA provides authority for citizen to sue “any. . . person who is alleged to be in violation of any rule, regulation, order or permit. . . .” 30 U.S.C. § 1270(a)(1). A citizen suit under SMCRA may be brought to compel compliance with the act. 30 U.S.C. § 1270. Pursuant to 30 U.S.C. § 1270(d) the court may award the costs of litigation, including attorney and expert witness fees to any party whenever the court determines such an award is appropriate.

## **FACTS**

31. Bluestone holds WV/NPDEs Permit WV1006304, which regulates discharges from the Red Fox Surface Mine, an approximately 1300-acre mine in McDowell County, West Virginia. Permit WV1006304 was most recently renewed on March 12, 2014, for a five-year term ending on August 13, 2018. On October 23, 2018, WVDEP extended the permit until February 13, 2019. On February 21, 2019, WVDEP again extended the permit, until August 13, 2019.

32. Mining at the Red Fox Surface Mine is conducted pursuant to WVSCMRA permit S007282. That permit was first issued by the WVDEP on August 2, 1982 and was most recently renewed on June 29, 2018.

33. Bluestone's WV/NPDES permit initially required compliance with the limits on total recoverable selenium in Part A of the permit at outlets 005-008 by June 13, 2016. On June 21, 2016, WVDEP modified the permit to extend that compliance deadline until June 22, 2018.

34. Outlets 005 through 008 each discharge into tributaries of Dry Fork of the Tug Fork River. Specifically, Outlet 005 discharges into Horsepen Creek; Outlet 006 discharges into unnamed tributaries of Big Creek and Jacobs Fork; and, Outlets 007 and 008 each discharge into Jacobs Fork.

35. In its monthly discharge monitoring reports, Bluestone has reported violations of its own permit limits for total recoverable selenium on the dates shown in Appendix A.

**FIRST CLAIM FOR RELIEF  
(CWA VIOLATIONS)**

36. Plaintiffs incorporate by reference, all allegations contained in paragraphs 1 through 35 above.

37. Since at least July of 2018, Bluestone has discharged and continues to discharge pollutants from point sources, i.e Outfalls 005 through 008 of the Red Fox Surface Mine into tributaries of Dry Fork of the Tug Fork River in excess of the limits allowed by permit WV1006304.

38. Dry Fork and its tributaries, including Horsepen Creek, Jacobs Fork, Big Creek, as well as unnamed tributaries receiving discharge from the Red Fox Surface Mine, are all waters of the United States within the meaning of 33 U.S.C. § 1362(7).



39. On information and belief, Defendant is in continuing and/or intermittent violations of the CWA as a result of its exceedance of effluent limits in WV/NPDES permit WV1006304.

40. Pursuant to sections 309(d) and 505 of the CWA, 33 U.S.C. §§ 1319(d) and 1365, Bluestone is liable for civil penalties up to \$54,833 for each violation that occurred after November 2, 2015. *See* 40 C.F.R. § 19.4; 84 Fed. Reg. 2059 (Feb. 6, 2019).

41. Bluestone should be subject to an injunction under the CWA, ordering it to cease its permit violations.

**SECOND CLAIM FOR RELIEF  
(SMCRA Violations)**

42. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 41, above.

43. Pursuant to WVSCMRA and its implementing regulations, mining performance standards are incorporated into Bluestone's mining permit. 38 C.S.R. § 2-3.33.c.

44. Those performance standards require that discharges from surface mines "be made in compliance with all applicable State and Federal Water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. § 434." 30 C.F.R. § 816.42; *see also*, 38 W.Va. C.S.R. § 14.5.b. Accordingly, violations of effluent limitations contained within Bluestone's WV/NPDES permit are also violations of SMCRA, WVSCMRA, and Bluestone's mining permit.

45. Each violation of Bluestone's mining permit is a violation of SMCRA and is enforceable under the statute's citizen suit provision, 30 U.S.C. § 1270(a).

46. Bluestone is subject to an injunction under SMCRA ordering it to cease its permit violations.

### REQUESTS FOR RELIEF

1. A Declaration that Bluestone has violated and is in continuing violation of the Clean Water Act and SMCRA;
2. An Injunction against Bluestone from operating its facilities in a manner that would result in further violations of its permits;
3. An Order that Bluestone immediately comply with the effluent limitations contained within permit WV1006304;
4. An Order that Bluestone immediately comply with the terms and conditions of WVSCMRA permit S007282;
5. An Order that Bluestone pay an appropriate civil penalty of up to \$54,833 per day for each CWA violation;
6. An Order awarding Plaintiffs their attorneys' fees, expert witness's fees, and all other reasonable costs and expenses incurred in the pursuit of this action; and,
7. A Grant of any other such relief as this Court deems just and proper.

Respectfully submitted,

/s/ J. Michael Becher

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**APPENDIX A: VIOLATIONS OF SELENIUM LIMITS**

	Month	Out-let	Para-meter	Limit	Units	Type	Reported	Units	% Over Limit
1	Jul-18	005	Se	4.7	µg/L	Avg	7.46	µg/L	59
2	Jul-18	005	Se	8.2	µg/L	Max	8.3	µg/L	1
3	Jul-18	006	Se	4.7	µg/L	Avg	7.18	µg/L	53
4	Jul-18	006	Se	8.2	µg/L	Max	8.87	µg/L	8
5	Jul-18	007	Se	4.7	µg/L	Avg	8.47	µg/L	80
6	Jul-18	007	Se	8.2	µg/L	Max	13.92	µg/L	70
7	Jul-18	008	Se	4.7	µg/L	Avg	7.59	µg/L	61
8	Jul-18	008	Se	8.2	µg/L	Max	14.02	µg/L	71
9	Aug-18	005	Se	4.7	µg/L	Avg	6.42	µg/L	37
10	Aug-18	006	Se	4.7	µg/L	Avg	5.62	µg/L	20
11	Aug-18	007	Se	4.7	µg/L	Avg	10.43	µg/L	122
12	Aug-18	007	Se	8.2	µg/L	Max	14.23	µg/L	74
13	Aug-18	008	Se	4.7	µg/L	Avg	9.86	µg/L	110
14	Aug-18	008	Se	8.2	µg/L	Max	12.41	µg/L	51
15	Sep-18	005	Se	4.7	µg/L	Avg	5.96	µg/L	27
16	Sep-18	006	Se	4.7	µg/L	Avg	6.05	µg/L	29
17	Sep-18	007	Se	4.7	µg/L	Avg	10.45	µg/L	122
18	Sep-18	007	Se	8.2	µg/L	Max	13.06	µg/L	59
19	Sep-18	008	Se	4.7	µg/L	Avg	9.56	µg/L	103
20	Sep-18	008	Se	8.2	µg/L	Max	11.93	µg/L	45
21	Oct-18	005	Se	4.7	µg/L	Avg	6.13	µg/L	30
22	Oct-18	006	Se	4.7	µg/L	Avg	5.79	µg/L	23
23	Oct-18	007	Se	4.7	µg/L	Avg	8.88	µg/L	89
24	Oct-18	007	Se	8.2	µg/L	Max	12.78	µg/L	56
25	Oct-18	008	Se	4.7	µg/L	Avg	9.41	µg/L	100
26	Oct-18	008	Se	8.2	µg/L	Max	12.02	µg/L	47

27	Nov-18	005	Se	4.7	µg/L	Avg	6.20	µg/L	32
28	Nov-18	006	Se	4.7	µg/L	Avg	6.24	µg/L	33
29	Nov-18	007	Se	4.7	µg/L	Avg	10.22	µg/L	117
30	Nov-18	007	Se	8.2	µg/L	Max	14.05	µg/L	71
31	Nov-18	008	Se	4.7	µg/L	Avg	8.67	µg/L	84
32	Nov-18	008	Se	8.2	µg/L	Max	11.72	µg/L	43
33	Dec-18	005	Se	4.7	µg/L	Avg	5.61	µg/L	19
34	Dec-18	006	Se	4.7	µg/L	Avg	5.44	µg/L	16
35	Dec-18	007	Se	4.7	µg/L	Avg	9.74	µg/L	107
36	Dec-18	007	Se	8.2	µg/L	Max	12.45	µg/L	52
37	Dec-18	008	Se	4.7	µg/L	Avg	8.08	µg/L	72
38	Dec-18	008	Se	8.2	µg/L	Max	9.77	µg/L	19
39	Jan-19	005	Se	4.7	µg/L	Max	6.64	µg/L	41
40	Jan-19	006	Se	4.7	µg/L	Avg	5.87	µg/L	25
41	Jan-19	007	Se	4.7	µg/L	Avg	9.89	µg/L	110
42	Jan-19	007	Se	8.2	µg/L	Max	13.00	µg/L	59
43	Jan-19	008	Se	4.7	µg/L	Avg	8.46	µg/L	80
44	Jan-19	008	Se	8.2	µg/L	Max	10.67	µg/L	30
45	Feb-19	005	Se	4.7	µg/L	Max	5.60	µg/L	19
46	Feb-19	006	Se	4.7	µg/L	Avg	5.64	µg/L	20
47	Feb-19	007	Se	4.7	µg/L	Avg	10.23	µg/L	118
48	Feb-19	007	Se	8.2	µg/L	Max	13.06	µg/L	59
49	Feb-19	007	Se	8.2	µg/L	Max	9.10	µg/L	11
50	Feb-19	008	Se	4.7	µg/L	Avg	7.62	µg/L	62
51	Feb-19	008	Se	8.2	µg/L	Max	10.00	µg/L	22
52	Mar-19	005	Se	4.7	µg/L	Avg	5.43	µg/L	16
53	Mar-19	006	Se	4.7	µg/L	Avg	4.80	µg/L	2
54	Mar-19	007	Se	4.7	µg/L	Avg	8.18	µg/L	74
55	Mar-19	007	Se	8.2	µg/L	Max	12.50	µg/L	52

56	Mar-19	008	Se	4.7	µg/L	Avg	7.38	µg/L	57
57	Mar-19	008	Se	8.2	µg/L	Max	10.5	µg/L	18
58	Apr-19	005	Se	4.7	µg/L	Avg	6.45	µg/L	37
59	Apr-19	006	Se	4.7	µg/L	Avg	5.30	µg/L	13
60	Apr-19	007	Se	4.7	µg/L	Avg	6.05	µg/L	29
61	Apr-19	007	Se	8.2	µg/L	Max	9.10	µg/L	11
62	May-19	005	Se	4.7	µg/L	Avg	5.63	µg/L	11
63	May-19	007	Se	4.7	µg/L	Avg	7.35	µg/L	20
64	May-19	007	Se	8.2	µg/L	Max	8.70	µg/L	56
65	Jun-19	007	Se	4.7	µg/L	Avg	8.03	µg/L	6
66	Jun-19	007	Se	8.2	µg/L	Max	9.80	µg/L	71
67	Jun-19	007	Se	8.2	µg/L	Max	9.30	µg/L	20
68	Jun-19	008	Se	4.7	µg/L	Avg	6.70	µg/L	13
69	Jun-19	008	Se	8.2	µg/L	Max	8.90	µg/L	43